NO. 83-506

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

DAN V. MCKASLE, ACTING DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Petitioner

V.

CONRADO U. VELA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT IN OPPOSITION

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I.

This matter is on petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Fifth Circuit in Vela v. Estelle, 708 F.2d 954 (5th Cir.), rehearing and en banc rehearing denied, ___ F.2d ____ (1983).

This supplemental brief in opposition is filed in response to the Court's November 29, 1983, request for copies of the petition for writ of habeas corpus filed in the state court, any response, and the order denying relief. These papers were not included in Petitioner's originally filed Appendices A and B or in Petitioner's later filed Appendices C, D, and F when Respondent filed the first Brief of Respondent in Opposition. Thus, the requested state court papers constitute "intervening matter not available at the time of the party's last filing." S. Ct. R. 22.6.[1]

II.

The first brief of Respondent in opposition describes the state habeas court proceedings and the subsequent federal proceedings. Brief of Respondent in Opposition at 2-5. This Court's perusal of the after-requested documents will confirm that preliminary account. Those documents strengthen that earlier discussion, amplified here, that the exhaustion doctrine has been satisfied.

The exhaustion issue which Petitioner has injected into this proceeding involves the supplemental brief filed by counsel appointed for the first time on appeal in the Fifth Circuit. Petitioner persists in objecting to the thoroughness and sophistication of the court-appointed counsel's briefing.

As for thoroughness, the state habeas court exhibited the same level of thoroughness in searching the record for particular positive aspects of defense counsel's trial performance. See Brief of Respondent in Opposition at 2, 4-5. Petitioner's own advocacy matched that same level of thoroughness in

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[1] Respondent has not been served with a copy of the after-requested documents. The discussion here necessarily relies on prior briefing and record excerpts in counsel's papers from the Court below.

opposing the issuance of the writ of habeas corpus in the Court below. See generally Supplemental Brief of Respondent - Appellee in Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983). Apparently, Petitioner is opposed to thoroughness only when it characterizes a winning advocacy on behalf of a prisoner.

As for sophistication, this Court is reminded that on state court direct appeal, defense counsel, who was ineffective at trial, represented Respondent and urged as error three state law evidence points which involved three of the most egregious errors he himself made. Brief of Appellant passim in Vela v. State, 516 S.W.2d 176 (Tex. Crim. App. 1974). On state and federal habeas trial proceedings, Respondent appeared pro se and presented as best he could the ineffectiveness claim under the sixth and fourteenth amendments. Respondent appeared pro se again in the Court of Appeals. After the case was briefed there, the Fifth Circuit sua sponte appointed present counsel and requested supplemental briefing. Appointed counsel invoked the same protections, briefed the same issue, and relied on the same record.

Petitioner should not be heard to complain that Respondent's court-appointed attorney provided the Fifth Circuit with a more thorough and more sophisticated advocacy of the same issue and the same facts for three reasons.

First, since Respondent appeared pro se before the state habeas court, less may be demanded in the way of explicit exhaustion. Blankenship v. Estelle, 545 F.2d 510, 514-15 (5th Cir. 1977), cert. denied, 444 U.S. 856 (1979); Macon v. Lash, 458 F.2d 942, 949 (7th Cir. 1972); S. Sokol, Federal Habeas Corpus, 167 (2d ed. 1969); L. Yackle, Post Conviction Remedies § 112 at 432 (1981); cf. Haines v. Kerner, 404 U.S. 519 (1972) (allegations of pro se litigant are held to less stringent standards than formal pleadings drafted by lawyers). If less is required, exhaustion has been satisfied.

Second, nothing less would discharge court-appointed counsel's duties to his client and the appointing Court. See A.B.A. Standards for Criminal Justice §§ 22-4.3 (Appointment of Counsel in postconviction remedies) & 21-3.2 (Counsel on appeal) (1980); Annot., 15 A.L.R.4th 582 (1982) (Adequacy of Defense Counsel's Representation of Criminal Client Regarding Appellate and Postconviction Remedies). Petitioner's wooden version of exhaustion would require every later court-appointed counsel to file a brief with the appointing Court which was a cut-and-pasted copy of any earlier filed pro se pleadings and briefs. The present appeal is a good example. For every record reference and citation of authority in Respondent's supplemental brief in the Court of Appeals not contained in the Respondent's pro se state application, Petitioner would be heard to cry foul. What then was the reason for the Court of Appeals to have appointed present counsel? See generally Rule on the Fifth Circuit Plan Under the Criminal Justice Act (implementing and supplementing 18 U.S.C. § 3006A (1964)). As described in the first brief of Respondent in opposition, a correct understanding of the policy and doctrine of exhaustion requires affirmance of the Court of Appeals.

Third, the exhaustion issue Petitioner raised was fully and fairly litigated in the Court below. Petitioner conceded exhaustion in the district court. Having had the benefit of extensive briefing, the three judge panel of the Court of Appeals carefully considered and decided the issue. More than eight pages of the panel opinion are devoted to the issue. See Appendix B, B-8 -- B-16, Petition for a Writ of Certiorari. The three panel judges and the full en banc complement of fourteen judges denied rehearing on the exhaustion issue. Of course, there is some measure of reviewability of the exhaustion doctrine. The doctrine is only a rule of timing, however, and not jurisdictional. See generally Yackle, The Exhaustion

Doctrine in Federal Habeas Corpus: An Argument for Return to First Principles Ohio St. L.J. 393, 440-14 (1983). The considered judgment of the federal judges who regularly apply the doctrine should be entitled to some measure of deference. Nothing is to be gained by reviewing the court below. This Court should not act as a court of errors and second guess all exhaustion decisions. Nothing about this exhaustion decision is unique in the run of exhaustion decisions. Neither an affirmance nor a reversal will add to the habeas corpus jurisprudence. This Court has better things to do.

III.

Consider this exhaustion issue from the standpoint of Respondent, an imprisoned pro se litigant who has presented his own petitions and briefs in losing efforts, who has had counsel appointed to assist him, who has had his most fundamental right to counsel vindicated by three and then fourteen federal judges. Petitioner would have this Court tell this man that had he only made express what he made implicit three years ago -- had he added a caret in his state court petition and scrawled in the margin this much: "Defense Counsel's overall performance was inadequate, but three examples predominated . . . ." -- then the federal court could hear him now. Has the Great Writ come to this? Neither Respondent nor the Court below understood the writ and this record that way.

In conclusion, the after-requested documents strengthen Respondent's position that the petition for a writ of certiorari should be denied.[2]

Respectfully submitted,

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[2] Fealty to client and Court compels the disclosure of the under-signed counsel's anxiety at learning of the Court's request. There is a concern that this Court might grant the writ and summarily reverse this case based on an erroneous exhaustion argument. Counsel here renews the request of the Brief of Respondent in Opposition n. 7 at 11:

> While Respondent urges denial of the petition, one cannot ignore the degree of discretion operative here, the proper exercise of which even the Justices of this Court may disagree on. See e.g., Anderson v. Harless, 103 S.Ct. 276, 280 (1982) (Stevens, J., dissenting); Roag v. MacDougall, 454 U.S. 364, 368 (1982) (Rehnquist, J., dissenting). Should this Court decide to perform as a court of errors, Respondent respectfully requests the opportunity to brief and argue the merits beyond the limits of this Brief in Opposition.

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